



POLICE DEPARTMENT

April 22, 2019

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In the Matter of the Charges and Specifications : Case No.
- against - : 2016-16813
Police Officer Andre Daniel :
Tax Registry No. 934717 :
72 Precinct :
-----X-----

At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Jeff S. Adler
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: Penny Bluford-Garrett, Esq.
Department Advocate's Office
One Police Plaza
New York, NY 10038

For the Respondent: John Tynan, Esq.
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New York, NY 10038

To:

HONORABLE JAMES P. O'NEILL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

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CHARGES AND SPECIFICATIONS

1. Said Police Officer Andre Daniel, while off-duty and assigned to the 72nd Precinct, in the confines of Kings County, New York, on or about December 21, 2016, did wrongfully operate a motor vehicle while under the influence of an intoxicant. (*Dismissed*)

P.G. 203-10, Page 1, Paragraph 5
NYS VTL SECTION 1192(2)

GENERAL REGULATIONS
OPERATING A MOTOR
VEHICLE WHILE UNDER THE
INFLUENCE OF ALCOHOL OR
DRUGS

2. Said Police Officer Andre Daniel, while off-duty and assigned to the 72nd Precinct, in the confines of Kings County, New York, on or about December 21, 2016, did wrongfully operate a motor vehicle while his ability was impaired by an intoxicant. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5

GENERAL REGULATIONS

- 3 Said Police Officer Andre Daniel, while off-duty and assigned to the 72nd Precinct, in the confines of Kings County, New York, on or about December 21, 2016, consumed an intoxicant to the extent that he was unfit for duty.

P.G. 203-04, Page 1, Paragraphs 1 & 2

FITNESS FOR DUTY

4. Said Police Officer Andre Daniel, while off-duty and assigned to the 72nd Precinct, in the confines of Kings County, New York, on or about December 21, 2016, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Police Officer Andre Daniel, after having been arrested for operating a motor vehicle while under the influence of an intoxicant, wrongfully refused to submit to a chemical breath test to determine his blood alcohol concentration. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5

PUBLIC CONTACT –
PROHIBITED CONDUCT

5. Said Police Officer Andre Daniel, while off-duty and assigned to the 72nd Precinct, in the confines of Kings County, New York, on or about December 21, 2016, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: having been involved in an unusual police occurrence, said officer failed to immediately identify himself as a New York City Police Officer to the New York City Police Officers who responded to the scene of said occurrence.

P.G. 203-10, Page 1, Paragraph 5

PUBLIC CONTACT –
PROHIBITED CONDUCT

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on March 7, 8, and 11, 2019. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The

Department called Lieutenant Luke Anderson, Sergeant Raymond Chang, Police Officer Sheena Blackman, Sergeant Joe Chen, Police Officer Ammar Burns, Captain Luis Ramirez, and Peter Khan as witnesses, and introduced hearsay statements of Person A and Person B. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having reviewed all of the evidence in this matter, I find as follows:

Specification 1 (driving under the influence): Dismissed before trial

Specification 2 (driving while impaired): Not Guilty

Specification 3 (unfit for duty): Not Guilty

Specification 4 (chemical breath test refusal): Guilty

Specification 5 (failure to identify self): Not Guilty

Recommended penalty: five (5) vacation days.

ANALYSIS

This case began with a motor vehicle accident in Brooklyn on December 21, 2016. At approximately 0235 hours, Respondent, who was off-duty at the time, rear-ended a double-parked car on 60th Street between 18th and 19th Avenues. The four occupants of the double-parked vehicle had exited the car prior to the impact, and there was only a minor injury to the leg of one of them, who was still standing near the vehicle at the time of the collision.

It is alleged that Respondent's ability to operate his vehicle was impaired by alcohol at the time of the incident, and that he was unfit for duty. Respondent also is charged with refusing to submit to a chemical breath test, and failing to immediately identify himself as an MOS to the responding police officers.

Sergeant Raymond Chang (who was a police officer on the date of the incident, and hereafter will be referred to as "Officer Chang"), testified that he and his partner, Officer Sheena Blackman, received a call for shots fired and a motor vehicle accident, and were the first to respond to the scene. He observed several males involved in a verbal dispute, and so he and his partner separated them. The officers quickly determined that no shots had been fired, and informed Sergeant Joe Chen, who also arrived on the scene, that it was merely a vehicle accident; Sergeant Chen then left the location. The officers spoke with the motorists from both vehicles regarding the accident. At some point Officer Chang recognized Respondent from a summer detail three years earlier, and Respondent confirmed that he was an MOS; Respondent had not identified himself as a police officer prior to that moment. The operator of the other vehicle was Person A. (Tr. 30-32, 39-42)

While Officer Chang was back in his RMP doing paperwork, Peter Khan, [REDACTED] [REDACTED] arrived at the scene and became involved in a verbal dispute with Respondent. Officer Chang and his partner exited their car to separate them. Peter Khan asked that Respondent be tested to see if he was drunk, and so Officer Chang summoned Sergeant Chen back to the location. The sergeant arrived and instructed his operator, Officer Ammar Burns, to administer a portable breath test to Respondent. Sergeant Chen also directed Officer Chang to administer a separate breath test to Respondent. Officer Chang, who had not been trained on performing such tests, but had witnessed someone else administer the test in the past, did so anyway, and the reading on the device was 0.00. (Tr. 33-35, 54)

Officer Chang testified that initially he did not smell alcohol on Respondent's breath, nor did he observe any of the other common indicia of impairment or intoxication, such as bloodshot, watery eyes or slurred speech. Respondent was not unsteady on his feet, nor was he disheveled, and he was able to answer questions regarding what had transpired. However, at the

time Officer Chang administered the breath test, for the first time he noticed a "faint smell" of alcohol on Respondent. (Tr. 34-36, 44-47)

Officer Sheena Blackman testified that she and her partner separated Peter Khan and Respondent when they were arguing. Officer Blackman was with Khan, who stated that they should test Respondent because he was drunk. Sergeant Chen returned to the scene at least 40 minutes later, and the breath testing was done. Officer Blackman did not witness any signs that Respondent was intoxicated. (Tr. 59-62)

Officer Ammar Burns testified that when he drove Sergeant Chen to the scene the first time, they only were there about 10 minutes, and had no interactions with the motorists. When they returned to the scene about an hour later, Sergeant Chen ordered Officer Burns to administer a portable breath test on Respondent, even though he wasn't trained to do so. Officer Burns did administer the test, and the reading was 0.059. About one to two minutes later, the straws were swapped out on the breath-testing device, and Officer Chang performed a second test, which yielded a reading of 0.00. Officer Burns testified that Officer Chang seemed to know what he was doing when he administered the second test. (Tr. 138, 140-41, 143, 147-48, 151)

According to Officer Burns, Respondent appeared to be sober, and did not exhibit any signs of intoxication. Respondent had no problem standing, did not appear disheveled, and had a calm demeanor. While he was testing Respondent, Officer Burns did not smell any alcohol on Respondent. However, after Respondent was placed into the rear seat of their RMP, Officer Burns, who was in the driver's seat, smelled alcohol, though he could not remember whether it was from Respondent's mouth or clothing. Respondent stated that he was coming from a Christmas party, and that the last drink he had was around 2200-2230 hours. (Tr. 141-43, 145-46, 149, 151)

Sergeant Joe Chen testified that when he returned to the scene at approximately 0333 hours, Respondent told him he had a few beers that night, between 2000 and 2200 hours. Sergeant Chen claimed that he smelled a very faint odor of alcohol from Respondent's mouth. The sergeant had Officer Burns and Officer Chang administer separate breath tests to Respondent, even though neither had been trained to do so.¹ (Tr. 75-78, 81, 92, 98, 112, 119, 123)

Sergeant Chen testified that he called the duty captain, Captain Luis Ramirez, and told him that Respondent had rear-ended a double-parked car. Sergeant Chen informed the captain of the 0.059 reading, but did not mention the 0.00 result. When asked at trial to explain that omission, Sergeant Chen claimed, "It slipped my mind." (Tr. 77, 84, 110)

While still at the scene, Sergeant Chen spoke by phone with Captain Ramirez a second time. The captain told him that he had checked with Highway, and the reading of 0.059 was high enough to arrest Respondent for the infraction of driving while impaired. Respondent was brought to the 78th precinct, though Sergeant Chen testified that he briefly considered taking Respondent home instead before realizing he would get in trouble for doing so. At the stationhouse, Respondent refused to take the chemical breathalyzer test (Dept. Ex. 5), but he did perform the coordination test (Dept. Ex. 3), which he passed; the coordination report concludes with the IDTU technician's determination that Respondent was not under the influence. Sergeant Chen prepared a fitness for duty report (Dept. Ex. 6) in which he noted, aside from the very faint odor of alcohol, that Respondent's speech was normal, balance steady, eyes apparently normal (not bloodshot), attitude very polite, face color normal, and clothes neat. When asked

¹ Sergeant Chen admitted that he received a command discipline and forfeited one vacation day in connection with his handling of this matter, including allowing a non-trained MOS to perform a breath test. He also acknowledged that he, himself, had performed approximately 50 such breath tests, even though he, too, was not trained to do so.

whether Respondent was able to focus, Sergeant Chen testified, "Absolutely." Nevertheless, because of the .059 reading on one of the breath tests, Sergeant Chen found Respondent unfit for duty. (Tr. 84-86, 94-96, 110, 112-16, 126-28)

Captain Luis Ramirez testified that he was informed by Sergeant Chen that Respondent had registered a .06 on a field sobriety test. Sergeant Chen did not, however, tell the captain about the 0.00 reading on the second test. [REDACTED]

[REDACTED]

[REDACTED]

Captain Ramirez briefly encountered Respondent at the stationhouse. According to the captain, Respondent had a faint smell of alcohol on his breath. Respondent was crying, and had teary, red eyes. Respondent was not, however, staggering in the hallway, the color of his face was normal, his appearance was neat, and his balance and coordination were normal. Captain Ramirez also spoke with Sergeant Chen. He questioned the sergeant as to why he had conducted a field test on an MOS without first notifying the duty captain, which is the correct procedure. Sergeant Chen answered that he did not believe that Respondent was intoxicated, and so he was hoping for confirmation from a breath test that he could then show to the civilians at the scene. Captain Ramirez also learned that the officer who administered the test was not trained to do so, and Sergeant Chen had no idea whether the breath testing device was calibrated before the test. (Tr. 197-98, 202-03, 208, 210)

Captain Ramirez prepared a fitness for duty report (Dept. Ex. 7), in which he found Respondent unfit for duty. Captain Ramirez testified that at the time he made his finding, he only was aware of the first breath test. The captain first learned about the second breath test at least six or seven hours later, during Sergeant Chen's Department interview. The captain was extremely upset with Sergeant Chen, and the interview was stopped so the supervisors could

discuss how to proceed. By that time, [REDACTED] the appropriate notifications had been made. Captain Ramirez testified that the "overriding factor" in his finding Respondent unfit was the reading on the first breath test; had he known about the 0.00 reading on the second test, he may not have had enough information to find Respondent unfit for duty. (Tr. 199-200, 202, 205 07, 209)

Lieutenant Luke Anderson of Brooklyn South Investigations testified that he was assigned to monitor this matter. He stated that Respondent's driver's license was not suspended following a DMV refusal hearing, where the judge found that there was no probable cause to arrest Respondent. (Dept. Ex. 4) [REDACTED]
[REDACTED]

Peter Khan testified that he received a call from Person A that he had been involved in a motor vehicle accident, so Khan took a cab to the scene at about 0105 hours. He spoke with Person A, who was visibly upset since this was his first time driving Kahn's car, a brand new Lexus. Khan then went to check on Person A's friend, Person B, who had a minor bump on his leg. As he was speaking with Person B, Khan heard Person A and Respondent having a verbal altercation. Respondent was calling Person A "very harsh names" and threatening "to fuck him up." Khan ran between them, identified himself [REDACTED] and got very loud as he and Respondent exchanged words. The officers on the scene separated the two men. (Tr. 159-63, 172, 179-81)

According to Khan, Respondent clearly was drunk, and Khan asked officers to test him. Khan claimed that from his training with the military police, he recognized the signs of intoxication, such as how Respondent couldn't stand straight, was slurring his words, and his eyes were red. Khan did not, however, smell alcohol on Respondent, even though Khan "was in his face." Khan testified that Respondent was behaving in an aggressive manner, and was not at

all apologetic. Respondent stared at Person A and Khan was upset. In his testimony, Khan described Respondent more than once as a "thug with a gun." (Tr. 163-66, 176-77, 182-83, 185)

Khan and Person A were asked to come to the precinct. Khan claimed that at the stationhouse, Respondent was still swaying somewhat. Respondent stared at Person A in a way that made Khan believe that Respondent was memorizing Person A's appearance so he could later go after him, [REDACTED]. (Tr. 167-68, 175, 188)

Neither Person A nor Person B appeared to testify, despite subpoenas requesting their presence. Instead, an audio recording of their interviews on the date of the incident was admitted into evidence (Dept. Ex. 1) as well as transcripts of those interviews (Dept. Ex. 1A-1C).

In his interview, Person A stated that he double-parked to drop off two female friends. He and his friend, Person B, also exited the car, just as Respondent's vehicle came speeding down the block toward them. Person A noticed that Respondent initially had his head down, and then looked up and tried to swerve at the last minute. Respondent's vehicle collided with Person A's, and Person A called the police. According to Person A, Respondent was a little unsteady on his feet; he seemed like "he was either drunk or he was just like tired or something." Person A did not smell any alcohol on Respondent. He looked into Respondent's car and did not see any alcohol. (Dept. Ex. 1A at 3-8, 11)

Person A stated that when Kahn arrived, he told Kahn that "this retard was just speeding down." Respondent stated to Person A that he was talking a lot of shit, and the two of them exchanged words. Kahn intervened and told Respondent not to talk to Person A like that, before the cops separated them. (Dept. Ex. 1A at 8-9)

In his statement, Person B stated that after he got out of the car, he heard the sound of a vehicle speeding toward them. The vehicle collided with Person A's car, and one of the cars also made contact with Person B, causing injuries to his leg and back; Person B went to Maimonides Hospital, where he was given Motrin and discharged. According to Person B Respondent told them that he was looking at his phone while operating his car. Person B stated that Respondent was standing by his car, and from what Person B saw, Respondent seemed all right. (Dept. Ex. 1C at 11, 13-16, 19-20)

Respondent testified that on December 20, 2016, he worked a day tour, after which he attended a precinct holiday party. Respondent was at the party from around 1900 hours until 2330 hours, during which time he had two drinks of Baileys Irish Cream and ate food as well. He was on his way home when he received a call from some colleagues who asked Respondent to join them at a bar on 60th Street in Brooklyn. Respondent did so, and stayed until about 0220-0230 hours. Respondent stated that he ate some food at the bar, but did not drink since he was scheduled to work in the morning. (Tr. 213-14, 243-48)

According to Respondent, as he was driving on 60th Street [REDACTED], his phone fell between his seat and the center console. As Respondent reached down for the phone, he took his eyes off the road. When he looked back up, he noticed a double-parked car in front of him, but it was too late for him to avoid a collision. Respondent, who was unarmed, exited his vehicle and saw that there was no one in the other car. Some people standing to the side appeared to be irate, and were yelling at him; one person said, "We should jump you, you hit my vehicle." Respondent told them they should call 911, and returned to his car to wait. (Tr. 215-17, 249-51, 255-56, 270)

Police officers arrived a couple of minutes later. Respondent testified that as he spoke with Officer Chang about what happened, Officer Chang recognized him from the job;

Respondent confirmed that he was an MOS. Respondent returned to his car and sat there until a tow truck arrived. Two photographs in evidence (Dept. Ex. 8A 8B) show the damage to the right-front portion of his vehicle. Respondent exited his car and spoke with the tow driver, then heard someone from the side saying something to him. Respondent said, "Excuse me?" He and the other individual started walking toward one another before they were separated by the officers on the scene. (Tr. 217-21, 258-59, 264-66, 271)

Respondent testified that after Sergeant Chen returned to the scene, Officer Burns asked Respondent to blow into a breath-test device. Respondent asked the officer why, and he told Respondent it was Sergeant Chen's order. Respondent blew two times into the device, then blew again a few minutes later in a test administered by Officer Chang. Respondent was not told the readings for either test, but when he asked Sergeant Chen if everything was good, the sergeant replied yes. Sergeant Chen initially offered to give Respondent a ride home, but as they were driving the sergeant had a phone conversation with Captain Ramirez. After the call, Sergeant Chen told Respondent that they had to take him to the 78th precinct. (Tr. 224-29, 236-38, 263)

At the precinct, Respondent was brought to the IDTU unit where he agreed to take the coordination tests, all of which he passed. When asked to take a breathalyzer test, Respondent refused, explaining that he already had blown three times into breath-test devices at the scene, and was told everything was good. Respondent estimated that the two drinks he had consumed was five hours before the motor vehicle accident. (Tr. 231-36, 260, 267-68)

Specification 1, charging Respondent with driving while under the influence of an intoxicant, was dismissed before trial.

Specifications 2 and 3 are related, and will be considered together. Specification 2 charges Respondent with operating a motor vehicle while his ability was impaired by an

intoxicant, while Specification 3 alleges that he was unfit for duty due to consuming an intoxicant. Neither charge has been proven by a preponderance of the credible evidence.

Section 206-12 of the Patrol Guide states that common sense standards will be applied in determining whether an MOS is unfit for duty. The totality of the circumstances must be considered, including scientific evidence, "fitness for duty" reports, and witness statements

A. Scientific evidence:

Two separate breath tests were administered to Respondent at the scene. The first test yielded a reading of 0.059. If admissible, that reading would not be high enough to sustain a misdemeanor charge of driving while intoxicated, but could be considered as relevant evidence, though not conclusive, to support the infraction of driving while impaired. The second test yielded a reading of 0.00.

There were multiple problems with the reliability of these test readings. The disparity in the readings, just a few minutes apart, calls into question whether either one was trustworthy. Neither of the officers who administered the tests was trained to do so, nor was the supervising sergeant. There was no indication that the breath-test device was tested for operability before its use, or that it was properly calibrated by qualified parties. Under the circumstances present here, I find that the test results do not constitute reliable evidence that Respondent was unfit for duty, or that he was driving while his ability was impaired.

This tribunal is mindful that Respondent refused to take the chemical breath test at the precinct, and that refusal could be considered consciousness of guilt. However, Respondent explained that since he already had willingly taken more than one breath test at the scene, and was told that everything was okay, he did not think it was necessary to submit to another test. Similarly, the fact that Respondent crashed into a double-parked car might be considered evidence that his ability to drive was impaired, since he did have two drinks at the holiday party.

However, those drinks were approximately four-to-five hours earlier, and Respondent credibly testified that his inattentiveness was instead due to looking down for his phone. Person B confirmed that Respondent made a similar statement at the scene, suggesting that this was not a recent fabrication by Respondent. Further, Person A corroborated that Respondent was initially looking down as he was driving down the street, before looking up at the last moment. To be sure, Respondent drove in a distracted manner, leading to the collision that evening. But the scientific proof has failed to establish that his distraction was due to consuming an intoxicant.

B. Fitness for duty reports:

Two fitness for duty reports were prepared in this case. Both Sergeant Chen and Captain Ramirez concluded that Respondent was unfit. However, there were multiple problems connected with those determinations.

Sergeant Chen testified that he based his determination on the 0.059 reading on the first breath test. However, he completely disregarded the second test with a reading of 0.00. Indeed, Sergeant Chen did not even inform the duty captain about this second test, claiming it merely slipped his mind; Sergeant Chen, himself, was disciplined for his inadequate handling of this investigation. Also, as discussed above, there were several problems connected with the administration of the breath tests, including the lack of training and the uncertainty regarding the proper functioning of the devices.

Additionally, Sergeant Chen's own observations contradicted his finding that Respondent was unfit. Other than claiming to smell a faint odor of alcohol on Respondent, Sergeant Chen did not observe any of the other typical signs of intoxication. Indeed, his fitness for duty report specifically notes that Respondent's speech was normal, balance steady, eyes apparently normal, attitude polite, face color normal, and clothes neat. These observations are consistent with what Sergeant Chen stated to Captain Ramirez: he did not believe Respondent was intoxicated.

Similarly, Captain Ramirez's finding that Respondent was unfit is unpersuasive. During his brief interaction with Respondent at the precinct, Captain Ramirez noted a faint smell of alcohol on his breath. The captain claimed that Respondent was visibly upset during their conversation, which lasted less than 10 seconds; he was crying with teary, red eyes, and slurred an apology to him. However, the captain also indicated that Respondent's face color was normal, he had steady balance, was neat in appearance, and was not defiant. Additionally, Captain Ramirez, himself, acknowledged that he found Respondent unfit based on incomplete information. He stated that the overriding factor in his determination was the single breath-test reading, but that he was concerned with the lack of training, and the uncertainty regarding the calibration of the breath-test device. Moreover, Captain Ramirez testified that had Sergeant Chen presented him with all the relevant information, including the second breath test, he may not have had enough information to find Respondent unfit for duty.

As such, under the circumstances neither fitness for duty report is reliable evidence that Respondent was unfit for duty, or that his ability to drive was impaired by an intoxicant.

C. Witness statements:

Officer Chang, the first officer to interact with Respondent, had the best opportunity to observe Respondent and objectively assess his condition. Officer Chang, who was a patrol officer at the time, did not initially smell alcohol on Respondent's breath, nor did he observe any other sign that Respondent was intoxicated. Officer Chang testified in a straight-forward, credible manner that Respondent was not unsteady on his feet, did not have red, watery eyes, did not slur his words, and was not disheveled. When Officer Chang administered a breath test to Respondent, for the first time he noticed a *faint* smell of alcohol on Respondent. That faint smell is consistent with Respondent's explanation that he had two drinks of alcohol several hours earlier at the holiday party. Taken as a whole, Officer Chang's observations support

Respondent's position that his ability to drive was not impaired by an intoxicant, and that he was not unfit for duty.

Moreover, Officer Chang's testimony was corroborated by other witnesses and evidence. Officer Burns, who also administered a breath test to Respondent, testified credibly that Respondent appeared to be sober during their interaction, and did not exhibit any signs of intoxication: Respondent was standing fine, did not appear disheveled, and had a calm demeanor. Officer Burns did smell "something that smelled like alcohol" while Respondent was inside the RMP, either from his clothes or mouth; however, when he was administering the breath test to Respondent he did not smell any alcohol. Officer Blackman did not directly interact with Respondent, but she, too, testified that she did not observe any indications that Respondent was intoxicated during their time together at the scene.

Sergeant Chen and Captain Ramirez both determined that Respondent was unfit. However, as indicated above, after hearing their testimony I was not persuaded by the conclusions in their reports.

Neither Person A nor Person B appeared to testify, and so this tribunal was limited to a review of their previously recorded hearsay statements. In any event, Person A's observations of Respondent were ambiguous: he was uncertain whether Respondent was drunk or just tired. In his recorded statement, Person B stated that Respondent seemed "all right."

Peter Khan did appear to testify, and claimed that Respondent was drunk. He stated that Respondent was unsteady on his feet, slurred his words, and his eyes were red, though Khan did not smell alcohol on Respondent. However, there are multiple credibility concerns in connection with Khan's testimony. Khan demonstrated a strong and open bias against Respondent on the witness stand: he repeatedly referred to Respondent as a "thug with a gun" as he described

Respondent's aggressive behavior at the scene. Khan was bothered that Respondent was not apologetic for crashing into and damaging Khan's brand new Lexus, and Khan appeared to be deeply troubled at how Respondent was speaking to Person A at the scene. At times, Khan was argumentative as he testified, and more than once he laughed inappropriately at questions. Khan did not come across as a reliable narrator of what transpired on December 21, 2016, and I find it more likely than not that his testimony was exaggerated against Respondent.

Additionally, much of Khan's testimony was contradicted by the officers present at the scene, who consistently and credibly described Respondent's appearance as being very different than what Khan claimed. Further, the results of the coordination test taken by Respondent convincingly refute Khan's allegations. As indicated in Dept. Ex. 3, Respondent passed six different tests, involving an assessment of his speech, balance, and his ability to walk, turn, stand on one leg, and place his fingers to his nose. The IDTU technician, with no apparent stake in the outcome of this matter, concluded that Respondent was not under the influence of intoxicating beverages or drugs. Based on the totality of the credible evidence presented, I agree with that conclusion.

Having carefully considered the totality of circumstances, including the scientific evidence, the fitness for duty reports, and the witness statements, I am not persuaded that either charge has been proven. The record has failed to establish, by a preponderance of the credible evidence, that Respondent's ability to drive was impaired by an intoxicant, or that he was unfit for duty. Accordingly, I find Respondent not guilty of Specifications 2 and 3.

Specification 4 charges Respondent with refusing to submit to a chemical breath test after he was arrested. Here, it is undisputed that Respondent refused to submit to a chemical breath test at the 78th precinct. Counsel for Respondent notes that Respondent prevailed at his refusal

hearing because there was no probable cause to arrest him, and argues that he should similarly prevail here with respect to the disciplinary charge against him. This tribunal disagrees.

Section 203-04 of the Patrol Guide states that a UMOS who refuses to submit to chemical testing in connection with an alleged violation of section 1192 of New York State's Vehicle and Traffic Law will be charged with engaging in conduct prejudicial to the good order, efficiency, or discipline of the Department. That section explicitly defines what is expected of a UMOS, that an officer must comply with a request to take a chemical breath test. While Respondent was able to avoid having his license suspended as a result of his success at the refusal hearing, that success does not excuse his refusal to comply with an unambiguous Department directive. Accordingly I find Respondent guilty of Specification 4.

Specification 5 charges Respondent with failing to immediately identify himself as an MOS to the responding police officers at the scene. Respondent testified credibly that initially, he believed the investigation was for a motor vehicle accident. At that point, there was no necessity for Respondent to identify himself as an officer.

At some point during that investigation, one of the officers recognized Respondent as a police officer, and Respondent confirmed that he was an MOS. In his testimony, Officer Chang could not recall when precisely he had this conversation with Respondent. Respondent testified that it occurred early in the investigation, and that he believed the other officers on the scene then also became aware that he was an MOS. Further, Sergeant Chen testified that when he returned to the scene to investigate whether this was a DWI situation, as opposed to just a vehicle accident, Respondent approached him and identified himself as an MOS, and handed Sergeant Chen his identification card.

Based on the credible evidence presented, I am not persuaded that Respondent acted in a way that was prejudicial to the good order, efficiency, or discipline of the Department. The

record has failed to establish that Respondent committed misconduct by failing to immediately identify himself as a police officer. Accordingly, I find Respondent not guilty of Specification 5.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on July 1, 2004. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum. Respondent has no disciplinary record. He has received one medal for Excellent Police Duty.

Respondent has been found guilty of only one specification, for refusing to submit to a chemical breath test. As discussed above, Respondent prevailed at his refusal hearing and his driver's license was not suspended after an administrative law judge found there was no probable cause [REDACTED]. Nevertheless, Respondent still was responsible for adhering to Department guidelines. By refusing to take the test, Respondent impeded the Department's investigation, and there must be some accountability for his actions.

There is a lack of precedent as to an appropriate penalty for such a refusal as a stand-alone count. Typically, misconduct of this sort is part of a case where there are more extensive findings of guilt, for driving while under the influence and being unfit for duty. Taking into account the totality of circumstances and issues in this matter, including Respondent's strong record with the Department, I recommend that Respondent forfeit five (5) vacation days.

Respectfully submitted,

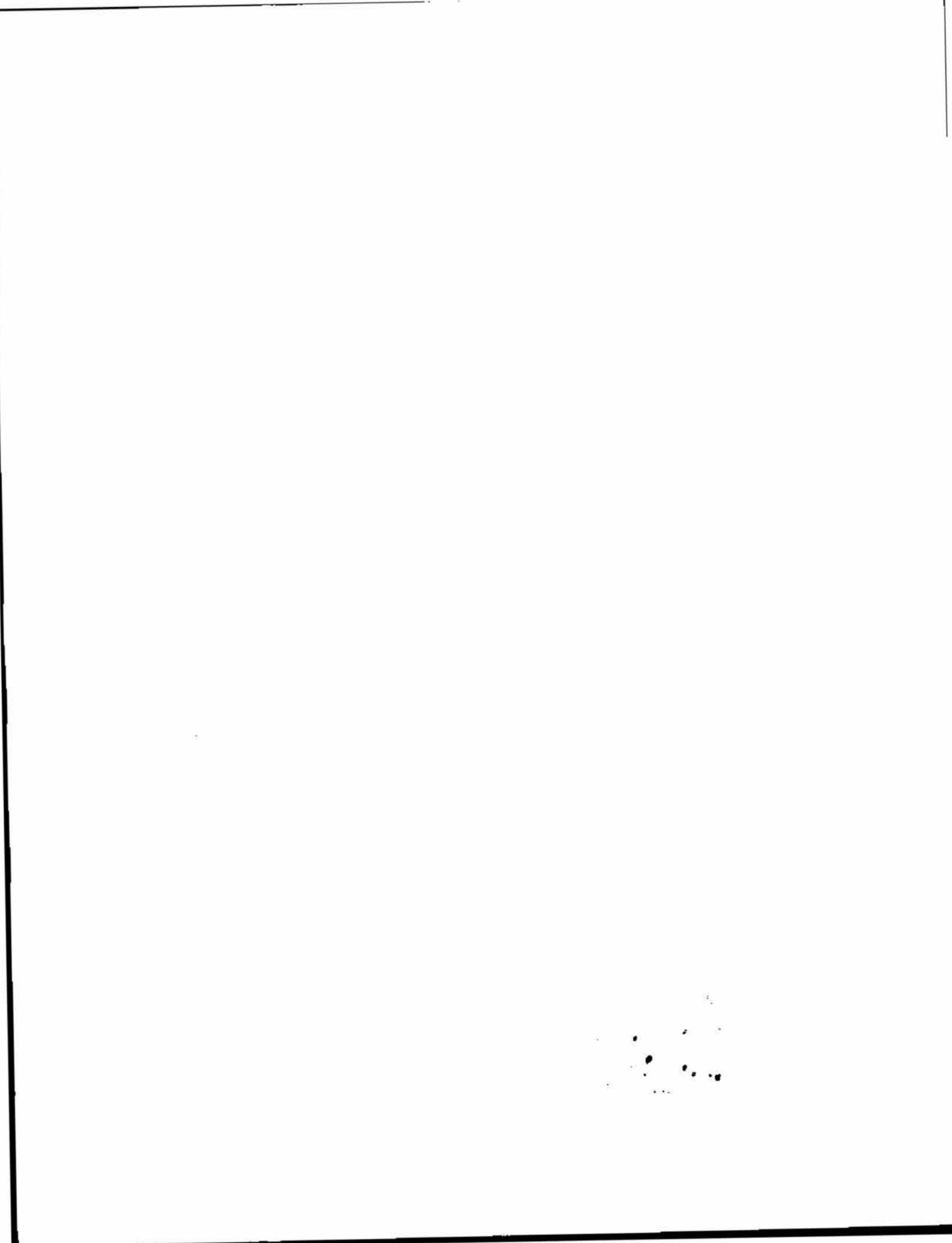


Jeff S. Adler
Assistant Deputy Commissioner Trials

APPROVED

JULY 1 2019

JAMES P. O'NEILL
POLICE COMMISSIONER





POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER ANDRE DANIEL
TAX REGISTRY NO. 934717
DISCIPLINARY CASE NO. 2016 16813

Respondent was appointed to the Department on July 1, 2004. On his last three annual performance evaluations, he received 3.5 overall ratings of "Highly Competent/Competent" for 2014, 2015 and 2016. He has one medal for Excellent Police Duty. [REDACTED]

Respondent has no disciplinary history. In connection with the instant Charges and Specifications, he was placed on Level 2 Discipline Monitoring on January 26, 2017. Monitoring remains ongoing.

For your consideration.

Jeff S. Adler
Assistant Deputy Commissioner Trials